MAY 22, 2019

COUNTDOWN TO PHASE 3 SKILLED NURSING COMPLIANCE PROGRAMS – COMPONENT #2 – ASSIGN OVERSIGHT RESPONSIBILITY OF COMPLIANCE PROGRAM

This is another article in a series discussing the complete overhaul of Part 483 to Title 42 of the Code of Federal Regulations the Requirements for States and Long-Term Care Facilities ("Final Regulations") by the Centers for Medicare & Medicaid Services ("CMS"). To view other articles in this series, click here.

Beginning on November 28, 2019, surveyors will use the requirements detailed in the Final Regulations by CMS to determine whether a skilled nursing facility's ("Facility") compliance and ethics program fulfills the requirements in the Final Regulations. One of the required components of the Facility's compliance and ethics program is that the Facility assign an individual to oversee the compliance program.

BACKGROUND AND PURPOSE OF A COMPLIANCE AND ETHICS PROGRAM

The Final Regulations created a new Section 483.85 requiring Facilities to have a compliance and ethics program. This regulation arises from Section 6102 of the Affordable Care Act, which added Subsection 1128I(b) to the Social Security Act.

Section 483.85(c) sets forth the required compliance and ethics program components for all Facilities. Under those regulations a compliance and ethics program means, with respect to a Facility, a Facility program that has been reasonably designed, implemented and enforced so that it is likely to be effective in preventing and detecting criminal, civil and administrative violations under the Affordable Care Act and in promoting quality of care; and includes, at a minimum, the required components specified in the Final Regulations.

REQUIRED COMPONENT #2 – OVERSIGHT OF COMPLIANCE AND ETHICS PROGRAM

Section 483.85(c)(2) of the Final Regulations demands that a Facility assign to a specific individual or individuals within the high-level personnel of the operating organization with the overall responsibility to oversee compliance with the operating organization's compliance and ethics program's standards, policies and procedures.

The required components identify that the individual who oversees the compliance and ethics program may be:

- The chief executive officer;
- A member of the board of directors; or
- A director of major divisions in the operating organization.

HIGH-LEVEL PERSONNEL

The Final Regulations define a "high-level personnel" as an individual who has substantial control over the operating organization or who has a substantial role in the making of policy within the operating organization.

ASSIGNMENT OF OVERSIGHT INDIVIDUAL

The details of the compliance and ethics program oversight responsibilities should be documented in job descriptions and should be identified in the compliance and ethics program's documents.

CMS COMMENTS ON THE FINAL REGULATIONS

Commenters to the Final Regulations recommended certain individuals who they believed should be involved in leading, developing and maintaining the Facility's compliance and ethics program, specifically professional social workers, who are guided by the National Association of Social Work Code of Ethics (2008), would be well equipped to contribute to and help to lead such programs. CMS agreed that social workers could play an important role in compliance and ethics programs. However, since not all Facilities are required to have a full-time social worker on staff, CMS did not require that a social worker be involved in developing, implementing and maintaining these programs.

THIS IS AN ADVERTISEMENT
© 2002-2024. Hall, Render, Killian, Heath & Lyman, P.C. All Rights Reserved.

STATE OPERATIONS GUIDANCE TO SURVEYORS

CMS has not issued guidance on how surveyors will interpret and cite the compliance and ethics program requirement.

Surveyors will likely ask to see the compliance and ethics program documents, as well as copies of documents evidencing the assignment of the individual to oversee the compliance and ethics program. The surveyors will also likely ask the staff and employees if they know the name of the individual who oversees the Facility's compliance and ethics program.

OIG GUIDANCE

In its 2000 memo titled "Publication of the OIG Compliance Program Guidance for Nursing Facilities," the Office of Inspector General ("OIG") wrote that Facilities should designate a compliance officer to serve as the focal point for compliance activities. This responsibility may be the individual's sole duty or added to other management responsibilities, depending upon the size and resources of the Facility and the complexity of the task. Designating a compliance officer with the appropriate authority is critical to the success of the program, necessitating the appointment of a high-level official with direct access to the Facility's president or CEO, governing body, all other senior management and legal counsel.

OIG developed a list of the compliance officer's primary responsibilities. These include:

- Overseeing and monitoring implementation of the compliance program;
- Reporting on a regular basis to the Facility's governing body, CEO and compliance committee (if applicable) on the progress of implementation;
- Periodically revising the program in light of changes in the organization's needs, and in the law and policies of Government and private payor health plans; and
- Developing, coordinating and participating in a multifaceted educational and training program.

OPERATING ORGANIZATIONS WITH FOUR OR FEWER FACILITIES

Operating organizations with four or fewer Facilities do not have to have an employee titled as the "compliance officer." However, the Final Regulations require that they have an employee that has specific compliance oversight responsibilities. All Facilities need to ensure that one or more individuals are responsible for overseeing the compliance and ethics program. The Final Regulations suggests that these individuals could be the CEO, board members or division directors.

IMPLEMENTATION TIME FRAME

Beginning on November 28, 2019, surveyors will use requirements detailed in 42 C.F.R. Section 483.85 to determine whether a Facility's compliance and ethics program fulfills the requirements in the Final Regulations.

ACTION ITEMS

- Review of documentation that evidences appointment.
- Review of compliance individual's role with Facility.

COMPLIANCE AND ETHICS PROGRAM TOOLKIT AVAILABLE

Hall Render has developed a compliance and ethics program toolkit to assist skilled nursing facilities in achieving compliance with Section 483.85 and the Final Regulations. For more information about the toolkit, please contact Sean Fahey at (317) 977-1472 or sfahey@hallrender.com.

If you have questions about this topic or would like assistance with the phase 3 compliance and ethics program requirements, please contact:

- Sean Fahey at (317) 977-1472 or sfahey@hallrender.com;
- Todd Selby at (317) 977-1440 or tselby@hallrender.com;
- Brian Jent at (317) 977-1402 or bjent@hallrender.com; and
- Your regular Hall Render attorney.

THIS IS AN ADVERTISEMENT
© 2002-2024. Hall, Render, Killian, Heath & Lyman, P.C. All Rights Reserved.